SEP 26 1956
JOHN T. FEY, Clerk

No. 454

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

THE CAPITAL NATIONAL BANK IN AUSTIN, TEXAS, ET AL.,
Petitioners,

v.

VIRGINIA L. LOONEY, ET VIR., AND EMMA L. BAKER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on June 30, 1956.

Citations to Opinions Below

The opinion of the Court of Appeals and the dissenting opinion, printed in Appendix B. hereto, *infra*, pp. 25-31, have not yet been reported.

The case was decided in favor of petitioners by the District Court (R. 60) without written opinion.

Jurisdiction

The judgment of the Court of Appeals was entered on June 30, 1956, and there was no application for rehearing filed. R. 74. The judgment is printed in Appendix C hereto, *infra*, pp. 31-32. The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1254(1).

Question Presented

Whether the United States District Courts have jurisdiction over a suit to annul provisions of a will probated in the County Court of Texas.

Constitutional Provisions and Statutes Involved

The Constitution of the State of Texas, Article 5, Section 16; Articles 3290, 3433, 3434 and 3435, Vernon's Texas Statutes (1925); The Uniform Declaratory Judgments Act of 1943, Art. 2524-1, Sections 1-5, Vernon's Texas Statutes (1925). They are printed in Appendix A, *infra*, pp. 21-24.

Statement

Respondents sued for a declaratory judgment to strike down certain provisions of a will as void and unenforceable. Jurisdiction of the district court was invoked because of diversity of citizenship, the

amount in controversy exceeding $3,000.00. The will which was the subject of the suit created a trust fund to be administered by a committee named in the will providing scholarships for needy students. R. 19-23. The testator, Franklin Lindsay, died May 1, 1954 (R. 37) and his will was admitted to probate by the County Court of Travis County, Texas, on May 17, 1954. R. 57. Respondents, who are the sisters of the testator, one of whom is married and was joined pro forma by her husband, filed this suit on March 16, 1955, as an action to construe the will. Respondents sought a declaration that the trust provisions of the will were void and unenforceable on the grounds that they violated the rule against prepetuities; that they discrimanated against members of the Negro race; that they inadequately defined the trust beneficiaries and that they illegally separated the functions of the trustee of the fund from those of the scholarship committee created to select the recipients of the scholarship loans. R. 9-14. No attack was made on the will for lack of testamentary capacity, undue influence or similar grounds.

Three of the defendants who were named in the will as members of the original scholarship committee filed a motion to dismiss the suit for lack of jurisdiction. R. 33. The District Court sustained this motion and ordered the case dismissed. R. 60. The Court of Appeals reversed the District Court and remanded the case for trial on the merits. R. 74. Judge Jones dissented from the Court's action. R. 74.

Reasons for Granting the Writ

There are two compelling reasons for granting this writ:

1. The decision of the Court of Appeals conflicts directly with the decision of this Court in *Sutton v. English*, 246 U. S. 199 (1918).

2. The question in the case involves a complex and important phase of federal court jurisdiction, which, if the opinion of the Court of Appeals states the law, wil give the federal courts the greatest increase in jurisdiction by judicial fiat they have received in a great many years.

1. The Decision Below Conflicts with Sutton v. English.

The case of *Sutton v. English*, 246 U. S. 199 (1918), was presented to this Court as a direct appeal from an order of a United States district court dismissing a bill in equity brought for the purpose, among others, of annulling the residuary clause of the will of Mary Jane Hubbard. This Court held that the federal district court properly dismissed the case on the ground that the established law was that the jurisdiction of the federal courts did not extend to the setting aside of wills or probate thereof or to any matters of strict probate. This Court correctly stated the rules governing jurisdiction of the federal courts in the probate field as follows:

"By a series of decisions in this court it has been established that since it does not pertain to the general jurisdiction of a court of equity to set aside

a will or the probate thereof, or to administer upon the estates of decedents in rem, matters of this character are not within the ordinary equity jurisdiction of the Federal courts; that as the authority to make wills is derived from the states, and the requirement of probate is but a regulation to make a will effective, matters of strict probate are not within the jurisdiction of courts of the United States; that where a state, by statute or custom, gives to parties interested the right to bring an action or suit inter partes, either at law or in equity, to annul a will or to set aside the probate, the courts of the United States, where diversity of citizenship and a sufficient amount in controversy appears, can enforce the same remedy, but that this relates only to independent suits, and not to procedure merely incidental or ancillary to the probate; and further, that questions relating to the interests of heirs, devisees, or legatees, or trusts affecting such interests, which may be determined without interfering with probate or assuming general administration, are within the jurisdiction of the Federal courts where diversity of citizenship exists and the requisite amount is in controversy. Broderick's Will (Kieley v. McGlynn) 21 Wall. 503, 509, 512, 22 L. ed. 599, 602, 603; Ellis v. Davis, 109 U. S. 485, 494, et. seq., 27 L. ed. 1006, 1008, 3 Sup. Ct. Rep. 327; Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 89, 110, 50 L. ed. 101, 111, 25 Sup. Ct. Rep. 727; Waterman v. Canal-Louisiana Bank & T. Co., 215 U. S. 33, 43, 54 L. ed. 80, 84, 30 Sup. Ct. Rep. 10."

This Court then held that under the probate statutes of Texas an action to annul a will is but a phase of the probate process of Texas and not a separate action *inter partes*.

To avoid the effect of *Sutton v. English*, respondents urged two theories, first, that their grounds for annulling the charitable trust provisions of the will were not "strictly probate", that is, not grounds such as lack of testamentary capacity or undue influence, and, second, that the Uniform Declaratory Judgments Act of 1943, Art. 2524-1, Vernon's Texas Statutes (1925), created a new remedy which conferred on the Texas state courts of general jurisdiction the power to annul a provision of a will. It was on this second ground that the Court of Appeals based its decision. Neither of these theories supports the decision.

In the case of *Farrell v. O'Brien (O'Callaghan v. O'Brien)*, 199 U. S. 89 (1905), Justice White carefully examined the authorities and concluded:

"First. That, as the authority to make wills is derived from the state, and the requirement of probate is but a regulation to make a will effective, matters of pure probate, in the strict sense of the words, are not within the jurisdiction of courts of the United States.

"Second. That where a state law, statutory or customary, gives to the citizens of the state, in an action or suit *inter partes*, the right to question at law the probate of a will or to assail probate in a suit in equity, the courts of the United States, in administering the rights of citizens of other states or aliens, will enforce such remedies."

The object of the action in *Farrell v. O'Brien* was to have the probate of a purported nuncupative will declared void as being a fraudulent concoction, or as being probated without notice in violation of the due process clause of the United States Constitution. Certainly the second of these grounds is not

a "purely probate" attack on the will. This Court held in that case that the federal courts did not have jurisdiction over the suit since it was not under the probate statutes of the State of Washington a suit *inter partes.*

It is true that as pointed out by the Court of Appeals in the opinion in this case *Sutton v. English* involved an attack on the entire will of Mary Jane Hubbard on the ground of undue influence; but it is likewise true that the principal attack was on the residuary clause of the will, even though the rest of the will was valid.

There is no suggestion in *Sutton v. English* that the jurisdictional question is controlled by the grounds which the contestant of a will advances for its invalidity. The case simply recognizes the general rule that under Texas law any suit an annul a will or any provisions thereof is a matter of strict probate and not an action *inter partes.* Indeed the initial case announcing the proposition that a suit to annul a will or provision thereof must be brought in the probate court as part of the probate process does not qualify or modify the rule. *Franks v. Chapman,* 60 Tex. 46 (1883). The Supreme Court of Texas in that case recognized that the probate court had exclusive jurisdiction to consider the validity of the will in whole or in part. To permit a contestant of a will to annul one of its provisions in a separate action in a state or federal district court would be to allow a collateral attack on the judgment of the probate court which declared the will to be valid, and such an attack must be made in a direct proceeding in the probate court to set aside all or a portion of its judgment and not collaterally.

Hudgins v. Leggett, 84 Tex. 207, 19 S. W. 387 (1892); *Jones v. Wynne*, 133 Tex. 436, 129 S. W. 2d 279 (1939).

The decision of the Court of Appeals in this case was not founded on the proposition that an action to annul provisions of a will is strictly probate only if the grounds for annullment are lack of testamentary capacity, undue influence or similar grounds. Such a holding would conflict with the Court of Appeals' own opinion in *Heath v. Jones*, 168 F. 2d 460 (5th Cir. 1948), in which one of the grounds by which the probate of the will was sought to be set aside was that notice to the contestant was inadequate and consequently the due process clause of the Fourteenth Amendment had been violated. Certainly that ground was not "strictly probate". Likewise a holding that the ground for annulling a provision of a will must be "strictly probate" would be contrary to the decision in *Miller v. Weston*, 199 Fed. 104 (8th Cir. 1912). In that case, as in this case, an attack was made on the trust provisions of a will on the ground that they violated the rule against perpetuities. The court held in that case that the federal courts had no jurisdiction of an action to annul provisions of a will on the ground that a trust in perpetuity had been created.

The Effect of The Uniform Declaratory Judgments Act of 1943

While the opinion below suggests the possibility that the district court had jurisdiction because the suit was not an attack on the will on "strictly probate" grounds the court based its decision on the

premise that the Texas Declaratory Judgments Act, Art. 2524-1, Vernon's Texas Statutes (1925), created a new remedy in a suit *inter partes*, in the state district courts to annul provisions of a will. In the language of that court,

"At the time of the decision of Sutton v. English (1918), the Texas State courts of general jurisdiction had no power to annul any particular provision of a will in a suit inter partes. By the enactment of the Uniform Declaratory Judgment Act in 1943 by the Texas Legislature, such power was vested in the state courts of general jurisdiction."

Thus, the Court of Appeals held that, by enacting the Uniform Declaratory Judgments Act of 1943, the Texas Legislature endowed the federal courts in Texas with far greater jurisdiction over probate matters than they had under the decision of this Court in *Sutton v. English*. Moreover, the effects of the decision of the Court of Appeals are not confined to the jurisdiction of federal courts in Texas. At the latest count 36 states had adopted the Uniform Declaratory Judgments Act. 9 Uniform Laws Annotated, 1955 *Pocket Part*, p. 110. If the opinion of the Court of Appeals is the law, jurisdiction of the federal courts has also been greatly expanded in those states, and they too can and must now inquire into purely local matters of probate with which they have not heretofore concerned themselves.

The Court of Appeals supported this vast enlargement of federal jurisdiction by citing *Rust v. Rust*, 147 Tex. 191, 211 S. W. 2d 262, 214 S. W. 2d 462; and *Republic National Bank v. Fredericks*, 274 S. W. 2d 431 (Tex Civ. App.). Before demon-

strating that these cases do not support the holding of the Court of Appeals it should first be pointed out that prior to the Texas Constitution of 1876 original actions to contest the validity of wills admitted to probate by the county court could be brought in the district court. *Franks v. Chapman*, 60 Tex. 46 (1883). Such original jurisdiction was, however, taken away from the state district courts by the Constitution of 1876, since which time they have had only appellate jurisdiction in such matters. *Franks v. Chapman, supra.* This Court has expressly recognized that ". . . by repeated decisions of the supreme court of Texas . . ., *under the present Constitution*, the district courts have no jurisdiction to annul by an original proceeding the action of a county court in probating a will, their jurisdiction in the premises being confined to a review by appeal or certiorari, which is in effect but a continuation of the probate proceedings." *Sutton v. English*, 246 U. S. 199, 207 (1918). (Emphasis supplied.)

Thus, if the Texas Legislature intended to vest the state district courts with original jurisdiction to annul provisions of wills, as the Court below held, by enacting the Uniform Declaratory Judgments Act of 1943, it unquestionably acted contrary to the mandatory provisions of the Texas Constitution. The Uniform Declaratory Judgments Act of 1943 does not, however, purport to vest such jurisdiction in the state district courts. Section one of that act expressly provides that "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. . . . " Such language evidences no purpose to vest

jurisdiction to annul particular provisions of a will in the state district court which, since the adoption of the Constitution in 1876, has never had such jurisdiction or to change an action *in rem* to one *inter partes*. Any such purpose is, on the contrary, negatived by the words "within their respective jurisdictions."

Nor do the cases cited by the court purport to hold that the district courts have such jurisdiction. In *Rust v. Rust*, supra, suit was instituted by the executors and trustees, joined by certain contingent beneficiaries, to secure a construction of the will of John Y. Rust, Jr. The Court of Civil Appeals held that the action would properly lie under the Declaratory Judgment Act of 1943, and that even in the absence of that statute

"*The district courts are authorized to construe doubtful wills at the instance of executors.* See Shindler v. Cooke, Tex. Civ. App., 90 S. W. 2d 292, Error Refused, and supporting authorities." (211 S. W. 269. Emphasis supplied).

That this was the only holding of the Court in *Rust v. Rust, supra*, is abundantly clear from the following quotation from the opinion of the same Court in *Shindler v. Cooke*, 90 S. W. 2d 292 Austin Civ. App. 1935. Writ ref.):

"Under the rule in this state that where the construction of a clause of a will is doubtful, and it is shown that the executor or executrix will in all probability be presently called upon to act under the will, it is his or her duty to apply to a court of competent jurisdiction for its construction, and that such an action shall be entertained in the district court which has jurisdiction to construe wills." Citing authorities. (90 S. W. 2d 293).

An analogus situation would be presented if The Capital National Bank in Austin as executor and trustee under the will had filed a suit in state district court to construe the will because of doubts which it entertained as to how it should proceed in the administration.

It is furthermore significant that in the *Rust case* the only attack which was made on the jurisdiction of the district court was that the Declaratory Judgment Act of 1943 was not applicable to the proceeding. It was not contended that the probate court had exclusive jurisdiction under Arts. 3433-4-5, Vernon's Texas Statutes (1925), and that question was not considered by the Court. While the effect of the holding in the *Rust case* was to invalidate an attempted trust as violating the rule against perpetuities, the case is not authority for the proposition that a suit to annul a portion of a will can be brought in district court because (1) it was brought by the executors to determine how to proceed with the administration of the estate, and (2) no contention was made as to the exclusive jurisdiction of the probate court.

The case of *Republic National Bank of Dallas v. Fredericks*, 274 S. W. 2d 431 (Tex. Civ. App. 1954. Rev'd. 283 S. W. 2d 39), is a good example of a situation in which it was necessary and proper for a state district court to entertain an action to construe a will. In that case the testamentary trustee sued for a declaratory judgment to determine whether or not it could pay a beneficiary's medical expenses from the corpus of the trust fund established by the will. No attack was made on the will or any of its provisions.

The Texas cases demonstrate that both before and after the pasage of the Uniform Declaratory Judgment Act of 1943 the county court had exclusive jurisdiction to annul a will even where it was asserted that the will was void as creating a perpetuity. In *Hunt v. Carroll*, 157 S. W. 2d 429 (Beaumont Civ. App. 1941, writ dism. 168 S. W. 2d 238, 1943), for example, such a suit was brought by the testator's daughter in probate court "praying for judgment annulling and suspending the provisions of the last will and testament" on the ground that such provisions violated the rule against perpetuities. In holding that the suit was properly brought in probate court the court significantly said:

"Under Articles 3433, 3434, 3435, R. C. S. 1924, *appellees were required to bring this suit in the county court where the will was probated*". (157 S. W. 2d 434. Emphasis supplied).

Similarly in *Hilgers v. Hilgers*, 159 S. W. 851 (Amarillo Cir. App. 1913. No writ history), a suit by an heir to annul a will which had already been probated was brought in district court, but both the trial court and the Court of Civil Appeals held that the district court was without jurisdiction of the matter since it was a suit of which the probate court had exclusive jurisdiction.

In *Brooker v. Brooker*, 130 Tex. 27, 106 S. W. 2d 247 (1937), heirs of the decedent brought suit in probate court to annul a part of the decedent's will on the ground that the portion under attack violated the rule against perpetuities. It was ap-

parently recognized that the probate court and not the district court was the only court in which the suit coud be filed.

A similar situation was presented in *Ragland v. Wagener*, 142 Tex. 651, 180 S. W. 2d 435, 152 A. L. R. 1232 (1944), in which an heir sued in probate court to annul a part of a will. The interesting contention was made in that case that the probate court had no jurisdiction because the construction of the will was involved. The Supreme Court held, however, that under Arts. 3433-4-5, Vernon's Texas Statutes (1925), the probate court "has jurisdiction and authority to annul any or all of the provisions of a duly probated will" and that "it necessarily follows that as incident thereto such court would also have the authority to construe such provisions of the will as may be necessary in the proper determination of the question of annulment." (152 A. L. R. 1236.)

The Court of Appeals was therefore clearly wrong in holding that the Uniform Declaratory Judgment Act of 1943 superseded the Texas Constitution by conferring jurisdiction to annul a provision of a will on the state district court, and that by virtue of that act what was an essentially *in rem* and strictly probate matter under the decision of this Court in *Sutton v. English* had been changed to an action *inter parties*. It is certain then that the holding of the Court of Appeals is in conflict with the holding of this Court in *Sutton v. English* which has neither been overruled by subsequent decision nor superseded by statute.

2. The Question in the Case Involves a Complex and Important Phase of Federal Court Jurisdiction, which, if the Opinion of the Court of Appeals States the Law, Will Give the Federal Courts the Greatest Increase in Jurisdiction by Judicial Fiat they Have Received in a Great Many Years.

The extent to which the federal courts may exercise some degree of probate jurisdiction under their general equity powers has been the subject of frequent decisions in this Court. Three of the earlier cases which formulated the rules relating to federal jurisdiction in the probate field were *Broderick's Will (Kieley v. McGlynn)* 21 Wall. 503 (1874); *Gains v. Fuentes*, 92 U. S. 10 (1875) and *Ellis v. Davis*, 109 U. S. 485 (1883). The first of those cases established the rule generally that federal courts have no jurisdiction to annul wills if exclusive probate jurisdiction is given to the state probate court. The second case laid down the rule that the federal courts have jurisdiction of an action *inter partes* even though probate matters are collaterally involved; but in that case the question of whether or not the action was one *inter partes* and properly brought in the state court of general jurisdiction was not decided, the only question being whether it could be removed if properly brought. In that case this Court pointed out that while the action was in form a suit to annul a will, it was in fact brought by strangers to the estate to restrain the use of a probated will as a muniment of title

insofar as it affected their property. The third of those cases, *Ellis v. Davis*, recognized that under the probate systems of some states a will once probated is conclusive until set aside in a separate action brought *inter partes* for that purpose, which judgment would be binding only on the parties and privies, and that in such instances a suit to set aside the probate of the will would be within the jurisdiction of the federal courts.

In applying the rules established by these cases the Court in *Farrell v. O'Brien (O'Callaghan v. O'Brien)*, 199 U. S. 89 (1905), concluded simply that the only dispute which could arise under the foregoing rules was whether or not the action assailing the will was *inter partes;* and the Court pointed out that in those states affording a remedy to set aside the probate of a will which is ancillary to and a continuation of the probate process the action is not *inter partes*. The Court concluded that under the law of the State of Washington a suit contesting the probate of a will was not an ordinary suit between parties but was an essential part of the probate proceedings of that state, pointing out that a judgment annulling a will binds the whole world and not merely parties and privies. The same conclusion was reached by this Court in *Sutton v. English*, 246 U. S. 199 (1918), in which it was held that under the laws of Texas a suit to annul a will was a continuation and an essential part of the probate process.

Prior to *Sutton v. English* but after the decision in *Farrell v. O'Brien, supra*, this Court decided

Waterman v. Canal Louisiana Bank and Trust Co., 215 U. S. 33 (1909), which suit was brought to establish the plaintiff's right to a lapsed legacy and to require an accounting of the executor. As to the prayer for an accounting this Court held that the granting of such relief would constitute an interference with the orderly administration of the estate; but that insofar as the action sought only to establish the claimant's right to the lapsed legacy it was within the district court's jurisdiction, since it neither interfered with the administration nor sought to set aside the probate of the will. Recently in the case of *Markham v. Allen*, 326 U. S. 490 (1946), this Court followed the *Waterman case* and held that an action by the Alien Property Custodian to establish the rights of certain German legatees under a will probated under the laws of California was a proper subject of federal jurisdiction. No attack on the provisions of the will was made by either party, the only question being the validity and effect of a California statute purporting to place inheritance by non-resident aliens on a reciprocal basis.

The respondents placed much reliance in the lower Courts upon the holder of this Court in *Markham v. Allen.* They urged that under the California law an action to determine the rights of legatees or heirs at law could be brought only in the probate court of that state; that this Court held that the federal district courts had jurisdiction of the action even though the state superior courts did not have such jurisdiction; and that accordingly it was not necessary that the state courts of general jurisdic-

tion have jurisdiction over a particular cause of action in order to give the federal courts jurisdiction over it. Such a holding, however, in nowise alters the holdings of *Farrell v. O'Brien (O'Callaghan v. O'Brien)*, *supra*, or *Sutton v. English*, *supra*, to the effect that, since wills and the rights of probate are created exclusively by authority of the state, federal courts have no jurisdiction thereof unless the probate matter in question ceases to have an exclusively *in rem* and probate character and by state law or custom becomes a suit between private parties. In that event the federal courts have jurisdiction as in other cases of diversity of citizenship. All such matters are still exclusively probate under the Texas law.

The question of federal jurisdiction in these matters is a continuing one and the lower federal courts have not recognized *Markham v. Allen* as changing the previously existing law. See e. g. *Heath v. Jones*, 168 F. 2d 460 (5th Cir. 1948); *Harrold v. First National Bank of Fort Worth*, 93 F. Supp. 882 (D. C. E. D. Texas, 1950); and *McCan v. First National Bank of Portland*, 139 F. Supp. 24 (D. C. Oregon, 1954. Aff'd. 229 F. 2d 859).

As is shown above, the effect of the decision below is to extend enormously the heretofore limited jurisdiction of the federal courts in the probate field in the 36 states which have adopted the Uniform Declaratory Judgments Act. Prior to the decision of the Court of Appeals in this case it had been uniformly held that in those states in which an action to annul a will is a matter *in rem* and exclus-

ively probate the federal courts may not entertain suits involving such purely probate matters. If the decision stands, however, the effect of the adoption of the Act by any such state will be to create a new action *inter partes* to annul wills and to review other probate matters and hence to confer jurisdiction upon the federal courts if diversity of citizenship exists. It is not therefore merely a question of whether the rule of *Sutton v. English* and *Farrell v. O'Brien (O'Callaghan v. O'Brien)* has been reversed by the States of Texas and Washington in adopting the Uniform Declaratory Judgments Act, but it is rather a question of whether all the states in which actions to annul wills are *in rem* and exclusively probate have, by adopting that Act, abandoned their previous probate scheme to the extent that such actions are now *inter partes*.

The decision in this case thus has a far greater effect on the jurisdiction of the federal courts than initially appears. If they may now assume jurisdiction of suits to annul wills and of other probate matters because of a state's adoption of the Uniform Declaratory Judgments Act that jurisdiction should be firmly established by a decision of this Court. If, as petitioners believe, there has been no extension of the federal courts' power to hear purely probate matters by a state's adoption of the Uniform Declaratory Judgments Act then assuredly the decision of the Court of Appeals below should be reversed and the exercise of that jurisdiction denied. In either instance the decision below that federal courts may now operate in a purely probate field which previously was not within the scope of their

operations is of such importance as to merit the attention of this Court.

Conclusion

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

The Constitution of the State of Texas, Art. 5, Sec. 16:

County Courts: jurisdiction; appeals to Court of Civil Appeals and Court of Criminal Appeals; disqualification of judge

. . .

Sec. 16. The County Court shall have the general jurisdiction of a Probate Court; they shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis and common drunkards, grant letters testamentary and of administration, settle accounts of executors, transact all business appertaining to deceased persons, minors, idiots, lunatics, persons non compos mentis and common drunkards, including the settlement, partition and distribution of estates of deceased persons and to apprentice minors, as provided by law; . . .

Articles 3290, 3433 and 3435 Vernon's Texas Statutes (1925)

Article 3290.

The county court shall have general jurisdiction of a probate court. It shall probate wills, grant letters testamentary or of administration, settle the accounts of executors and administrators, and transact all businesses appertaining to the estates of deceased persons, including the settlement, partition and distribution of such estates. Const. art. 5, sec. 16.

Article 3433.

When a will has been probated, its provisions and directions shall be specifically executed, unless annulled or suspended by order of the court probating the same in a proceeding instituted for that purpose by some person interested in the estate. Such proceeding shall be by application in writing, filed with the clerk of the court, setting forth the objectionable provisions and directions in the will, and the grounds or objections. P. D. 5623.

Article 3434.

Upon the filing of such application, the clerk shall issue a citation for the executor or administrator to appear at a regular term of such court and answer such application; the substance of the application shall be stated in the citation; and such citation shall further direct such executor or administrator to refrain from executing the provisions and directions in the will that are objected to, until such application has been heard and decided by the court.

Article 3435

If it appears upon the hearing of such application that no material injury to the interests of the applicant will be occasioned by executing the provisions and directions of the will, and that such provisions and directions are legal, the objections shall be overruled, and the provisions and directions objected to shall be confirmed and executed, and an order to that effect shall be entered upon the minutes; otherwise, an order shall be entered upon the

minutes of the court annulling the provisions and directions in the will to which objections are sustained, or suspending the execution of the same until the further order of the court.

Article 2524-1, Secs. 1-5, Uniform Declaratory Judgments Act, Cernon's Texas Statutes (1925)

Scope

Section 1. Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Power to construe, etc.

Sec. 2. Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a Statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, Statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Before breach

Sec. 3. A contract may be construed either before or after there has been a breach thereof.

Executor, etc.

Sec. 4. Any person interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto:

(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others; or

(b) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capaciaty; or

(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

Enumeration not exclusive

Sec. 5. The enumeration in Sections 2, 3, and 4 does not limit or restrict the exercise of the general powers conferred in Section 1, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15860

VIRGINIA L. LOONEY, ET VIR., AND EMMA L. BAKER,
Appellants,

v.

CAPITAL NATIONAL BANK OF AUSTIN, TEXAS, ET AL.,
Appellees.

Appeal from the United States District Court for the Western District of Texas.

(June 30, 1956.)

Before RIVES, TUTTLE, and JONES, Circuit Judges.

RIVES, Circuit Judge: The district court dismissed for want of jurisdiction a complaint seek-

ing a declaratory judgment[1] to the effect that a testamentary trust of a residuary estate is void and unenforceable as violative of the rule against perpetuities and because the objects of the trust have failed, and are contrary to public policy. The grounds upon which the trust is attacked do not include lack of testamentary capacity, improper execution of the will, or illegal probate. Indeed, the complaint concedes that, except for the claimed illegal trust, the will is valid and effective. The district court did not reach the merits, that is, whether the testamentary trust is valid or invalid, and nothing that we may say should be construed as expressing any opinion on that question. The issue is solely one of federal jurisdiction.

It was stipulated that the testator died May 1, 1954, his will was duly probated on May 17th and letters testamentary issued to The Capital National Bank in Austin, which qualified as independent executor. As such, it "has determined and paid the debts of said estate, part of the specific bequests as outlined in the will and is now holding the rest and residue of said estate in its trust account." It was further stipulated that the plaintiffs, appellants, are sisters of the testator and his sole and only heirs at law. As such, they seek a decree directing

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[1] "§2201. *Creation of remedy*

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." 28 U.S.C.A. §2201.

the executor to pay to them the net residuary estate.

Federal jurisdiction is invoked on diversity of citizenship. The amount in controversy exceeds $3,000,00, indeed, the value of the residuary estate is in excess of two million dollars. There is also the requisite diversity of citizenship. It is claimed, however, that this is not a case within the judicial power of the United States, because it affects probate or other matters concerning the administration or settlement of a decedent's estate.

The many cases on that general subject are collected in an annotation in 158 A.L.R., pp. 9 to 76, and its supplemental citations; see also 54 Am. Jur., U.S. Courts, §36, 45 C.J.S., Federal Courts, §12. The general principles are well understood, and a brief restatement of such, as are here applicable, should suffice.

Article III, Section 2 of the Constitution provides that, "The judicial power shall extend * * to controversies * * between citizens of different states." 28 U.S.C.A. 1332 provides that,

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between.
>
> "(1) Citizens of different States".

Nevertheless, in general, federal jurisdiction does not extend to matters strictly probate or administrative in nature, because they are statutory, involve proceedings in rem, and do not belong to the general

jurisdiction of a court of equity. Cases of that general nature do occasionally arise under circumstances making them ordinary suits in equity, and in such cases a state may not *restrict* the judicial power of the United States. On the other hand, a state may *enlarge* federal jurisdiction by the creation of a new remedy by civil action inter partes in its own courts of general jurisdiction.

The present case may be an ordinary suit in equity involving the validity of a trust, and the fact that the trust was created by a will rather than by an instrument inter vivos may be immaterial. We shall assume, however, that the case would be strictly probate or administrative in the absence of a remedy inter partes in the state courts of general jurisdiction. It is well settled that, where state courts of general jurisdiction are granted the power to determine inter partes the validity vel non of provisions of a will, a United States court in that state has jurisdiction to entertain such an action where the requisite diversity of citizenship and amount in controversy are present, and so long as it does not interfere with the administration of the estate in a state court. *Simlar v. Wilson*, 210 F. 2d. 99; same case on last grant of certiorari, 350 U.S. 892, 24 L.W. 3137, 3140; *Sutton v. English*, 246 U.S. 199, 205; *Markham v. Allen*, 326 U.S. 490, 494.

In *Sutton v. English, supra*, the plaintiffs sought to annul parts of the 12th paragraph of the will of Mary Jane Hubbard on the ground

> "that in her last sickness, while she was clouded in her intellect and was not of

> sound or disposing mind or memory, she was unduly influenced by the defendant English to execute an instrument in the form of a will purporting to dispose of her accumulations and separate property, by the 12th paragraph of which she gave and bequeathed all the residue of her property to her niece Cora D. Spencer." 246 U.S. at pp. 202, 203.

That was a matter strictly probate, the testamentary capacity of the testator. As has been said, no such ground is urged in the present case. At the time of the decision of *Sutton v. English* (1918), the Texas State courts of general jurisdiction had no power to annul any particular provision of a will in a suit inter partes. By the enactment of the Uniform Declaratory Judgment Act in 1943 by the Texas Legislature, such power was vested in the state courts of general jurisdiction[2].

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[2] Vernon's Ann. Civ. Sts., Art. 2524-1:

"Sec. 1. Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. * * *

"Sec. 2. Any person interested under a will * * * may have determined any question of construction or validity arising under the instrument * * * and obtain a declaration of rights, status, or other legal relations thereunder.

"Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or *cestui que trust*, in the administration of a trust, or of the estate of a decedent, * * * may have a declaration of rights or legal relations in respect thereto:

"(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others; or

"(b) To direct the executors, administrators, or trus-

At one time the Supreme Court held that a federal court had no jurisdiction to proceed in accordance with a state declaratory judgment act, because no "case" or "controversy" was presented. *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70. Any such doubt as to constitutional limitations on federal judicial power have now been removed in cases such as this presenting for decision an actual controversy. *N.C. & St. L. Ry. v. Wallace*, 288 U.S. 249, 259; *Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 241; *Southern Harlan Coal Co. v. Ala. Fuel & Iron Co., E.D. Ky.*, 58 F.Supp. 600; Constitution of United States Revised and Annotated, 1952, Doc. 170, 82nd Congress, p. 551. The remedy being available in the Texas State courts, and the requisite diversity and jurisdictional amount being present, a like remedy may be asserted in the federal court under the Federal Declaratory Judgment Act, footnote (1) *supra*.

The judgment is, therefore, reversed and the cause remanded.

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tees to do or abstain from doing any particular act in their fiduciary capacity; or

"(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings."

"Sec. 5. The enumeration in Sections 2, 3, and 4 does not limit or restrict the exercise of the general powers conferred in Section 1, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty." For pertinent cases construing said statute, see, Rust v. Rust, 147 Tex. 181, 211 S.W.2d 262, Aff. 214 S.W. 2d; Republic Nat. Bank of Dallas v. Fredericks, Tex. Civ. App., 274 S.W. 2d. 431. Cf.,however, Harrold v. First Nat. Bank of Ft. Worth, N.D. Tex., 93 F.S. 882.

REVERSED AND REMANDED.

JONES, Circuit Judge, dissenting:

Believing that *Sutton v. English*, cited by the majority, is applicable here and that it has not been overruled by subsequent decision or superseded by legislation, I dissent.

A True Copy:
Teste:

(Seal) (Signed) John A. Feehan, Jr.
Clerk of the United States Court of Appeals for the Fifth Circuit.

APPENDIX C

JUDGMENT.

Extract from the Minutes of June 30th., 1956.

VIRGINIA L. LOONEY, ET VIR ,and EMMA L. BAKER, No. 15860

versus

CAPITAL NATIONAL BANK OF AUSTIN TEXAS, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of

the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellees, Capital National Bank of Austin, Texas, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Jones, Circuit Judge, dissenting."